YUNESWARAN RAMARAJ v. PP

HIGH COURT MALAYA, JOHOR BAHRU
MOHD SOFIAN RAZAK J
[CRIMINAL APPEAL NO: 42S-09-9-2013
23 SEPTEMBER 2014

CRIMINAL LAW: *Offences – Illegal assembly – Police informed of assembly six hours before assembly was held – Whether in breach of requirement of s. 9(1) of Peaceful Assembly Act 2012 – Whether notification of gathering must be done within 10 days prior to assembly – Whether notice of assembly contained name and particulars of accused person – Accused person convicted and sentenced to fine of RM6,000 and in default, imprisonment of three months by Sessions Court– Whether accused person was organiser of illegal assembly – Non-calling of person whose name and particulars were in notice – Whether adverse inference under s. 114(g) of Evidence Act 1950 should be invoked – Whether sentence excessive*

CONSTITUTIONAL LAW: *Jurisdiction – High Court – Accused person convicted by Sessions Court for informing police of assembly six hours before assembly was held – Whether in breach of requirement of s. 9(1) of Peaceful Assembly Act 2012 – Whether notification of gathering must be done within 10 days prior to assembly – Whether ss. 9(1) and (5) constitutional – Whether ultra vires art. 10 of Federal Constitution – Whether issue of constitutionality could be determined by High Court – Whether High Court exercised appellate or original jurisdiction since criminal matter originated from Sessions Court*

The appellant, the executive secretary of Pakatan Keadilan Rakyat Johor ('PKR Johor'), had notified the OCPD Johor Bahru Selatan ('OCPDJBS') at 2.30pm that an assembly was to be held on the same day between 8.30pm to 12am. Despite containing the name and particulars of Dato' Chua Jui Meng, the notice was signed on behalf of the latter by the appellant. In the Sessions Court, the appellant was charged in his capacity as an organiser of the assembly for failing to notify the OCPDJBS of the gathering within ten days before the date the assembly was supposed to be held, as required by s. 9(1) of the Peaceful Assembly Act 2012 ('PAA'). Satisfied that the appellant had failed to cast any reasonable doubt on the prosecution's case, the Sessions Court Judge ('SCJ') convicted the appellant for the offence and sentenced him to a fine of RM6,000 and in default thereof, imprisonment of three months. Aggrieved, the appellant appealed against his conviction and sentence. The issues that arose for the court's determination were (i) whether the appellant was an organiser within the meaning of s. 3 of the PAA; (ii) whether the SCJ erred in law in ruling that s. 114(g) of the Evidence Act 1950 was not applicable by the failure to call Dato' Chua Jui Meng; (iii) whether the SCJ erred in law and in fact in not considering the plea of mitigation in sentencing the appellant; and (iv) whether ss. 9(1) and (5) of the PAA were *ultra vires* arts. 10(1) and (2) of the Federal Constitution ('the Constitution'). The issue of constitutionality in this case related to

A another pending case before the Court of Appeal, *Nik Nazmi Nik Ahmad v. PP* ('*Nik Nazmi*'s case). The court then adjourned the matter pending the decision of *Nik Nazmi*'s case. The Court of Appeal in *Nik Nazmi*'s case held that s. 9(5) of the PAA was *ultra vires* art. 10 of the Constitution for criminalising a breach of the restriction under s. 9(1) and therefore unconstitutional. The
B respondent urged the court to defer its decision pending the outcome of *Nik Nazmi*'s appeal to the Federal Court and proceeded to file a notice of motion ('encl. 2') seeking the court's discretion and inherent power to refer the constitutional question of whether s. 9(5) of the PAA was consistent and not *ultra vires* of the Constitution to the Federal Court, pursuant to s. 84 of the
C Courts of Judicature Act 1964.

Held (allowing appeal):

(1) The appellant was indeed the organiser of the assembly. Not only did the appellant submit the notice to the OCPDJBS, he had also periodically informed members about the progress of the assembly
D through his Facebook and Twitter. This tantamount to the appellant informing, arranging and being responsible for the conduct of the assembly which was consistent with his position as an executive secretary of PKR Johor, as prescribed in the definition of an organiser in s. 3 of the PAA. (para 41)

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(2) Dato' Chua Jui Meng could not be considered as an organiser as he had done nothing which could bring him within any of those prescribed in s. 3 of the PAA except for the fact that in the column under particulars of organiser, his name and NRIC was stated. He was only present on the night of the assembly to speak. No adverse inference should be cast on
F the prosecution for failing to call Dato' Chua Jui Meng as a prosecution witness as no statement was recorded from him. (para 41)

(3) The fine imposed was fair and just in the circumstances as the case had proceeded for trial. Valuable court's time had been utilised with
G witnesses having to come and expended expenses for attending the trial. (para 42)

(4) Based on the doctrine of *stare decisis*, the court was bound to follow the decision of *Nik Nazmi*'s case which held that s. 9(5) of the PAA was *ultra vires* art. 10 of the Constitution for criminalising a breach of the
H restriction under s. 9(1) and therefore unconstitutional. The decision of the SCJ was therefore set aside and the payment of fine of RM6,000 was to be refunded. (para 44)

(5) In hearing the motion, the court was exercising its appellate jurisdiction and not exercising its original jurisdiction. The court was competent to
I hear the appeal even if the issue involved related to the question on constitutionality. Any aggrieved party may appeal to the Court of Appeal against the said decision and likewise, the Court of Appeal is equally competent to hear the appeal from the High Court even if it

involves question on constitutionality. When a criminal matter originated from the Sessions Court as in this instant case, the Court of Appeal stands as the final court or the apex court. No further appeal shall lie to the Federal Court and the appeal should stop at the Court of Appeal. (paras 35, 38 & 39)

Case(s) referred to:
Ahmad Zubair Hj Murshid v. PP [2014] 9 CLJ 289 FC ***(refd)***
Jayashankar M Raman & Satu Lagi lwn. PP [2012] 1 LNS 409 HC ***(refd)***
Munawar Ahmad Anees v. PP [2010] 1 CLJ 802 FC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Nik Nazmi Nik Ahmad v. PP [2014] 4 CLJ 944 CA ***(refd)***
Nik Norhafizi Nik Ibrahim & Ors v. PP [2012] 1 LNS 1784 HC ***(refd)***
S Mariappan v. The Government Of Malaysia [1983] 2 CLJ 124; [1983] CLJ (Rep) 382 FC ***(refd)***
Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(refd)***
Tan Tek Yan v. Samuel [1964] 1 LNS 199 FC ***(refd)***
Ti Chuee Hiang v. PP [1995] 2 CLJ 1 FC ***(refd)***
Wee Choo Keong v. Lee Chong Meng & Anor [1996] 3 CLJ 508 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 22, 30(1), (2), 84
Disciplinary Board Regulations 1972, reg. 3(1), (2)
Evidence Act 1950, s. 114(g)
Federal Constitution, art. 10(1), (2)(b)
Peaceful Assembly Act 2012, ss. 3, 9(1), (5), 10(b)

For the appellant - Hassan Abd Karim; M/s Hassan Karim & Co
For the respondent - Saiful Edris Zainuddin; DPP

[Appeal from Session Court; Arrest Case No: 63-55-05-2013]

Reported by Najib Tamby

JUDGMENT

Mohd Sofian Razak J:

[1] The appellant in this appeal was charged in the Sessions Court, Johor Bahru, Johor Darul Takzim with an offence under s. 9(1), Peaceful Assembly Act 2012 (hereinafter called 'the PAA') which is punishable under s. 9(5) of the same Act. The offence carries, upon conviction, the punishment of a fine not exceeding RM10,000. At the conclusion of the defence case, the learned Sessions Court Judge (hereinafter called 'the learned SCJ') held that the appellant has failed to cast any reasonable doubt on the prosecution's case and sentenced the appellant to a fine of RM6,000 and in default thereof, imprisonment of three months. The appellant appealed to this court against conviction and sentence. On 24 August 2014, the court after hearing submissions by both parties allowed the appellant's appeal and set aside the

A decision of the learned SCJ and ordered that the payment of fine of RM6,000 be refunded forthwith. Aggrieved by the said decision, the respondent has since filed an appeal to the Federal Court.

[2] The charge against the appellant is as follows:

B Bahawa kamu pada 15hb Mei 2013 jam lebih kurang 8.30 malam, di pejabat Parti Keadilan Rakyat No: 38, Jalan Baladu 19, Taman Putri Wangsa, Ulu Tiram, dalam daerah Johor Bahru, dalam Negeri Johor Darul Takzim, di mana Program Himpunan Black 505, Bantahan Terhadap SPR telah diadakan, sebagai penganjur program tersebut, kamu gagal memberitahu Ketua Polis Daerah Johor Bahru Selatan sepuluh (10) C hari sebelum program tersebut diadakan dan oleh yang demikian kamu telah melakukan kesalahan dibawah seksyen 9(1) Akta Perhimpuan Aman 2012 dan boleh dihukum dibawah seksyen 9(5) Akta yang sama.

[3] The appellant was thus charged in his capacity as an organiser of an assembly held at the office of the Parti Keadilan Rakyat, Johor Bahru, who D had failed to notify the OCPD Johor Bahru Selatan, of the gathering within the time required under the PAA, namely ten days before the date the assembly was supposed to be held. This requirement of notification of the assembly is stated in s. 9(1) which reads as follows:

9.(1) An organiser shall, ten days before the date of an assembly, notify E the Officer in Charge of the Police District in which the assembly is to be held.

[4] Section 9(5) further states:

9.(5) A person who contravenes subsection (1) commits an offence and shall on conviction, be liable to a fine not exceeding ten thousand ringgit.

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The Factual Background Of Case

[5] The uncontroverted facts of the case is that an assembly known as the 'Himpunan Black 505, Bantahan Terhadap SPR' was held on 15 May 2013 at about 8.30pm at the office of Parti Keadilan Rakyat No: 38, Jalan Puteri G Wangsa, Ulu Tiram, in the district of Johor Bahru. It is also not disputed that the appellant in his capacity as the executive secretary to the Parti Keadilan Rakyat Johor had notified the OCPD Johor Bahru Selatan at about 2.30pm of the assembly to be held on 15 May 2013 between 8.30pm to 12 midnight. As to the requirement regarding notification of assembly pursuant to s. 10 H of PPA of which the said notice is marked as exh. P3 and in column 1, the particulars for 'Nama dan No: Kad Pengenalan' is written as 'Dato' Chua Jui Meng IC: 431022-01-5081 and in column 2 the particulars for 'Alamat penganjur': 38, Jalan Beladau 19, Taman Putri Wangsa, 81800 Ulu Tiram'. Section 10(b) of PAA states that the said notification must be signed by the I organiser. However in the instant case exh. P3 was signed by the appellant and there is an abbreviation 'b/p' (means on behalf). The appellant before the Sessions Court and this court argued that since he had put the

abbreviation 'b/p' in exh. P3, he merely signed it on behalf of Dato' Chua Jui Meng the organiser and therefore he was not the 'organiser' within the meaning prescribed in s. 3 of PAA:

> 3. 'organiser' means a person who is responsible for the organisation of the assembly, including the arranging, convening, collecting or forming of the assembly, or who is responsible for the conduct of an assembly.

[6] At the outset of this appeal, the issue that was canvassed by both parties before the court was principally whether the appellant was an organiser within the meaning of s. 3 of PAA. If so, whether the appellant had contravened s. 9(1) of PAA. The other peripheral issues raised by the appellant are that the learned SCJ erred in law in ruling that s. 114(g) of the Evidence Act 1950 is not applicable by the failure to call Dato' Chua Jui Meng as a witness for the prosecution. That the said failure to call Dato' Chua Jui Meng leaves a gap in the prosecution's case and that the learned SCJ erred in law and in fact in not considering the plea of mitigation of the appellant when sentencing the appellant to a fine of RM6,000 and in default three months imprisonment.

Submission Of The Appellant

[7] The appellant's counsel argued that the pertinent question before the court is to escertain who was the organiser of the assembly held on 15 May 2013 at the material time and place as indicated in the charge. The appellant in his defence has denied the he was the organiser of the said assembly. To booster his defence, reference was made to several of the witnesses called by the prosecution themselves have testified that the appellant was not the organiser. SP7 Steven Chong who was the Deputy Secretary General of the PKR and also a member of the Political Bureau PKR Johor testified that the assembly was a political event organised by MPN (Majlis Pimpinan Negeri) of whom Dato' Chua Jui Meng is the Chairman. The appellant as an executive secretary to the PKR Johor has no political power to organise any assembly but merely to perform an administrative function of the party. He further stated that the appellant was merely a messenger and the organiser for the said assembly on 15 May 2013 was Dato' Chua Jui Meng. The witness also testified that the appellant was not seen at the assembly between 6.30pm and 1am in the morning of 16 May 2013.

[8] On the failure to call Dato' Chua Jui Meng the Chairman of PKR Johor as prosecution witness to satisfy whether he was the organiser of the assembly, leaves a gap in the prosecution's case and which is fatal. The learned counsel referred to a passage in *Ti Chuee Hiang v. PP* [1995] 2 CLJ 1; [1995] 2 MLJ 433 which is as follows:

> Having said that it is our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial(see *Adel Muhammed el Daddah v. AG of Palestine* (1944) AC 156 at pp. 167-169; (1944) 2 All ER at pp 143-144) the most basic limitation upon

A prosecutorial discretion in the presentation of a case is that it is also the duty to call all of the witnesses to establish proof against the accused beyond reasonable doubt, and if, in the exercise of its discretion, fails to fulfil this obligation – which is nothing less than a statutory duty – the accused must be acquitted.

B **[9]** In *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221; [1987] 1 MLJ 492 the Supreme Court at p. 233 (CLJ); para. B p. 494 states as follows:

... Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of
C failure to obtain evidence. It may be drawn from withholding not just any document but material document by a party in his possession, or for the non-production of not just any witness but an important and material witness to the case.

[10] It was further submitted that the failure to call Dato' Chua Jui Meng
D as a prosecution's witness leaves a gap in the prosecution's case and it was not the duty of the defence to close this gap. The learned counsel cited the case of *Abdullah Zawawi v. PP* [1985] 2 MLJ 16 whereby the Supreme Court held 'in view of these unsatisfactory features, the learned President should not have called upon the defence and likewise the learned Judge below should have allowed the appeal ... The practice of making available a witness
E from whom statements have been taken is to prevent the defence from commenting upon the honesty of the prosecution and thus invoking the often quoted presumption of adverse inference evidence falls short of proving a *prima facie* case at the end of its case, the right not to call such witness/ witnesses and to make them available to the defence will be of no avail. If
F the doubt consists of the gap arising out of the matters adumbrated earlier, the prosecution must close this gap. It is not for the defence to call the offered witness/witnesses to supplement the prosecution's case.'

[11] At the conclusion of its submission, the learned counsel urged the
G court to allow the appellant's appeal and set aside the decision of the learned SCJ.

The Submission Of The Respondent

[12] The learned Deputy Public Prosecutor (hereinafter called 'the learned deputy') in his submission submit that the appellant was indeed an organiser
H within the meaning as prescribed in s. 3 of PAA. It is obvious that the appellant as the person responsible for the submission of the notification notice exh. P3 at the IPD Johor Bahru Selatan and received by SP2. SP2 confirmed that the particulars in exh. P3 was filled up by the appellant and Dato' Chua Jui Meng's name as the organiser was stated but the appellant
I had signed exh. P3 and putting an abbreviation 'b/p' at the signature column. The learned deputy further submits that s. 10 of PAA requires the

notification notice be signed by the organiser. In the instant case Dato' Chua Jui Meng did not sign at the signature column as an organiser but the appellant did sign *albeit* by putting an abbreviation at the column where the organiser's signature is required. It is the also submitted that the appellant as an executive secretary for the PKR Johor, is also entrusted to arrange the assembly including the submission of the notification notice. Save and except at the column where the particulars of name and NRIC is stated Dato' Chua Jui Meng as appears in exh. P3, there is not a shred of evidence to indicate that Dato' Chua Jui Meng was the organiser for the assembly held on the date, time and venue as stated in the charge. Dato' Chua Jui Meng was only present on the night of 15 May 2013 to speak at the assembly.

[13] The learned deputy also referred to a decision in *Nik Norhafizi Nik Ibrahim & Ors v. PP* [2012] 1 LNS 1784 where the court in searching for the meaning of the words 'convene' 'collect' and 'organise' have looked at the meaning attributed to in the dictionary where in the '*Concise Oxford English Dictionary*' the word 'organise' is given *inter alia* the meaning of 'making arrangement or preparations for'.

[14] The learned deputy went further to state that the appellant was the only person who had made all the arrangement and preparations emanating with the submission of exh. P3 to the OCPD of Johor Bahru Selatan. Dato' Chua Jui Meng did not come to the IPD Johor Bahru Selatan or signing on exh. P3 as the organiser nor did he contact SP6 to inform that the appellant was submitting exh. P3 on his behalf. There were other compelling evidence to show that the appellant was presumed the organiser by conduct as stipulated in s. 19.

> 19. Presumption as to organiser.
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> If:
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> (a) an assembly is held at a designated place of assembly,
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> (b) an assembly is specified in the Third Schedule;
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> (c) a notification required under subsection 9(1) was given but the
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> Identity of the organiser stated in the notification is false,any person who initiates, leads, promotes, sponsors, holds or supervises the assembly, or invites or recruits participants or speakers for the assembly shall be deemed to be the organiser of the assembly.

[15] In the instant case, the learned deputy submitted that there was evidence that the appellant had invited or promoting the members to attend the assembly through his Facebook and Twitter as can be seen in exhibits P8A-D and P9A-E. The appellant had also through his Facebook and Twitter been giving update information pertaining to the assembly for the members to know. The presumption under s. 19 PAA is invoked as against the appellant.

[16] The learned deputy also submitted that the failure to call Dato' Chua Jui Meng as a witness for the prosecution should not attract any adverse inference as he was not at all involved in the organising of the assembly. The defence should call Dato' Chua Jui Meng as its witness if they were convinced that he was the organiser. The learned deputy also submitted that the principle in *Ti Chuee Hiang (supra)* on the facts did not apply to the instant case as in *Ti Chuee Hiang (supra)* the failure to call the agent provocateur or the informer was held to be fatal. In the instant case, the police had tried to contact Dato' Chua Jui Meng to assist in the investigation but of no avail. One of the observations made by the court in *Ti Chuee Hiang (supra)* is that the prosecution should make available witnesses from whom statements have been recorded. In the instant case, no statement was recorded from Dato' Chua Jui Meng as he failed to come forward and assist the police in its investigation as to who the organiser was if not the appellant. Since no statement was recorded from Dato' Chua Jui Meng despite effort by the police to trace him and of no avail therefore there was no requirement to call him as a prosecution witness.

[17] In so far as the appeal against sentence is concerned, the learned deputy submitted that the sentence meted on the appellant was after a full trial. The sentence of a fine of RM6,000 in default three months imprisonment was not excessive in the circumstances as the maximum fine for the said offence is RM10,000. The learned SCJ had imposed the said sentence after hearing the plea in mitigation by the defence counsel and reply by the learned deputy.

[18] On 26 January 2014, it is pertinent to note whilst the argument on the issues raised in the appellant's petition of appeal was dealt with by En Hassan Karim, another co-counsel of the appellant En Sivarasa addressed the court that the appellant wish to include a new ground of appeal in the petition, that is ss. 9(1) and 9(5) of PAA is unconstitutional as they infringe art. 10(1) and art. 10(2) of the Federal Constitution. The learned deputy objected to the inclusion of the additional ground of appeal as it was never raised during the trial at the Sessions Court and not included in the petition of appeal. Furthermore no application was filed to explain why it was not included as one of the grounds in the petition of appeal. The learned deputy cited the case of *Jayashankar M Raman & Satu Lagi lwn. PP* [2012] 1 LNS 409; [2012] 2 MLJ 561 where it is observed that the said case relates to the inherent power of the court to allow an application filed after the court had considered the grounds as stated in the affidavit in support. Learned counsel submitted that the court has the inherent power to allow a new ground of appeal to be included in the petition notwithstanding that it was not raised during the trial at the Sessions Court. Learned counsel referred to the Federal Court case of *S Mariappan v. The Government Of Malaysia* [1983] 2 CLJ 124; [1983] CLJ (Rep) 382 the brief facts are the appellant employed in the permanent pensionable service of the Government of Malaysia as a clerical officer

attached to the Telecoms Department was dismissed from service by the Public Service Commission ('PSC') on the ground that he failed to comply with a particular Treasury Instruction. The appellant appealed, solely relying on a point of law neither raised not pleaded in the lower court. His contention was that the disciplinary authority for the purpose of the appellant's category was the Public Services Disciplinary Board and not the PSC Board and therefore the exercise of power of dismissal was wrong and the dismissal void. It was submitted by the appellant that at the relevant time the Disciplinary Board Regulations, 1972, PU(A) 48 ('the Regulations') and that by virtue of arts. 144 (5B)(i) and (iv) the power to take the disciplinary action against him vested in the board pursuant to reg. 3(1) and (2) of the Regulations. The Federal Court held that 'in the exercise of its discretion and in the interest of justice would allow the point to be argued before it. The facts in the case were not in dispute. The point raised was not merely technical but essentially one of jurisdiction. A point not taken in the lower court will not be allowed to be argued unless the appellate court is satisfied that the evidence establishes beyond doubt that the facts, if fully investigated, would support the new plea.'

[19] A further authority on the principle followed by an appellate court in dealing with a point not taken at the trial may is found the case of *Tan Tek Yan v. Samuel* [1964] 1 LNS 199; [1964] MLJ 283 where it is held 'that a point not taken at the trial, and presented for the first time in the appellate court ought to be jealously scrutinised and an appellate court ought only to decide in favour of the appellant on a ground there put forward for the first time, if it is satisfied beyond any doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial.'

[20] The learned counsel alluded the court that it is important this new ground of appeal be included as one of the grounds in the petition of appeal by the appellant as it relates to the issue on constitutionality of s. 9(1) and 9(5) of PAA which is pending before the Court of Appeal in *Nik Nazmi Nik Ahmad v. PP* [2014] 4 CLJ 944 (Criminal Appeal No: B- 09-303-11-2013). In *Nik Nazmi Nik Ahmad*, *inter alia* it was argued that both ss. 9(1) and 9(5) of the PAA should be struck down as being *ultra vires* the Federal Constitution because (i) the requirement of ten day notice, having totally prohibited a spontaneous or immediate assembly, was an unreasonable restriction on the constitutionally guaranteed right of citizens to assemble peacefully; and (ii) even if the restriction under ss. 9(1) was reasonable, it was legally and constitutionally wrong to criminalise its breach.

[21] The learned deputy on the other hand submitted that, s. 9(1) of PAA is a provision of law which should be complied with by any party who wishes to organise an assembly. It sets up the procedure which has to be complied with before an assembly can take place. That the organiser has to

A serve the notification notice on the OCPD ten days before the assembly. It is obvious that the s. 9(1) is enacted not to restrict the right of the citizen to assemble. There is no longer the requirement that one has to get a licence before permitting to assemble. Under s. 9(1) of PAA you only need to notify the OCPD ten days before the date of the assembly. It is the view of the B respondent that s. 9(1) of PAA is not a restriction imposed on the freedom of the citizen to assemble but it only provide procedure before an assembly can be held and therefore it is not unconstitutional and *ultra vires* art. 10 of the Constitution.

[22] The court after hearing submissions from both parties and considering C the authorities submitted, and notwithstanding that no formal application to add a new ground of appeal in the petition of appeal was filed, allowed the appellant to include the issue on unconstitutionality of ss. 9(1) and 9(5) *ultra vires* art. 10(1) and 10(2) of the Constitution as a new ground in the petition of appeal. The court is satisfied that the new ground is not mere technicality D but involved a legal interpretation of ss. 9(1) and 9(5) of PAA whether they run contrary to the Constitution.

[23] At the material time learned counsel informed the court that the issue of constitutionality of ss. 9(1) and 9(5) of PAA is pending before the Court of Appeal and it would be desirable for the Court to wait for the outcome E of the decision of the Court of Appeal in *Nik Nazmi Nik Ahmad*'s case. The learned deputy had no objection that the decision in the instant case be deferred by the court after the decision by the Court of Appeal which was not known when. The court then adjourned the matter for decision to 24 February 2014, and 20 March 2014 pending the decision of the Court of F Appeal in *Nik Nazmi Nik Ahmad* but was informed that the Court of Appeal had not delivered its decision yet.

[24] The matter was again adjourned to 7 August 2014 where on the said date, the court was informed that the Court of Appeal in *Nik Nazmi Nik Ahmad* had delivered its decision and in essence held *inter alia* the unanimous G view of the court held that s. 9(5) of the PAA was *ultra vires* art. 10 of the Constitution for criminalising a breach of the restriction under s. 9(1) and therefore unconstitutional.

[25] The learned counsel urged the court to follow the decision of the Court of Appeal in *Nik Nazmi Nik Ahmad*'s case and is binding on this court to H follow and ruled that in the instant case s. 9(5) of PAA was *ultra vires* art. 10 of the Constitution for criminalising a breach of the restriction under s. 9(1) and therefore unconstitutional. The learned deputy however urged the court to defer its decision on the appeal by the appellant in the instant case as the prosecution in *Nik Nazmi Nik Ahmad*'s case had filed an appeal to the Federal I Court and the case is pending before the Federal Court. The court felt compelled to agree to the request to adjourn the decision in the instant case to a later date pending the outcome of the appeal in *Nik Nazmi Nik Ahmad* before the Federal Court. This was because on previous occasions the court

had allowed the appellant numerous adjournment pending the outcome of the decision in *Nik Nazmi Nik Ahmad* before the Court of Appeal. It would only be fair in the circumstances if the respondent (prosecution) is accorded the same request to defer the decision until the Federal Court has decided on the appeal. The court then deferred the decision of the appellant's appeal to the 11 August 2014.

[26] In a related turn of event, on 14 August, 2014, the court was informed that a notice of motion (encl. 2) *vide* Criminal Application No: 44-52-08-2014 dated 3 August 2014 was filed by the prosecution together with an affidavit in support affirmed on 3 August 2014 and fixed for hearing on the 14 August 2014. A copy of the same together with the affidavit in support (encl. 3) was served on the respondent (*ie* the appellant in the instant appeal). The appellant (respondent in notice of motion) requested for time to file its affidavit-in-reply to which the court allowed and directed parties to prepare written submissions and authorities and to hear the respondent's motion on 24 August 2014 together with the decision on the appeal by the appellant.

[27] The relief sought by the applicant in encl. 2 of the motion are as follows:

(i) That the court refers the constitutional question to the Federal Court whether the provisions of s. 9 in particular s. 9(5) of the PAA is consistent and not '*ultra vires*' the Federal Constitution;

(ii) That the decision in the appeal No: 42S-09-9-2013 fixed on 11 August 2014 be vacated until after the decision made by the Federal Court; and

(iii) Any other relief deemed just and equitable by the Honourable Court.

Submission By The Applicant (Prosecution) On Encl. 2

[28] The learned deputy submitted that the motion filed sought to seek the court's discretion and inherent power to refer the constitutional question of whether s. 9(1) and s. 9(5) of PAA is unconstitutional and *ultra vires* art. 10(2)(b) and read together with art. 4(2) of the Constitution pursuant to s. 84 of Courts of Judicature Act 1964 (hereinafter called 'the CJA').

84. Reference of constitutional question by the High Court.

(1) Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution, the Judge hearing the proceedings may stay the same on such term as may be just to await the decision of the question by the Federal Court.

(2) An order staying proceedings under this section may be made by the judge on its own motion or on the application of any party and shall be made at any stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.

A (3) Where an order for stay of proceeding has been made under this section the Judge shall state this question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.

B (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

[29] The learned deputy then alluded the court to art. 128 of the C Constitution where it states as follows:

(1) The Federal Court shall to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:

D (a) any question whether a law made by Parliament or by legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and

(b) disputes on any other question between States or between the E Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Federal Court where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit F the case to the other court to be disposed of in accordance with the determination.

(3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.

G **[30]** The learned deputy was also of the view that the words 'subject to any rules of court regulating the exercise of that jurisdiction' refers to the rules of court applicable to the Federal Court in exercise of its power. Perusing s. 30 of CJA, reveals that sub-ss. (1) and (2) are the rules referred to. In sub-s. 3 it states:

H (3) Subsections (1) and (2) shall be deemed to be the rules of court for the purposes of Article 128(2) of the Constitution.

[Sub-ss. (1) and (2)]

(1) Where in any proceedings in any subordinate court any question I arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court.

(2) Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen.

[31] Therefore it is important when art. 128 of the Constitution is read, it should be read together with ss. 30 and 84 of the CJA.

[32] In *Wee Choo Keong v. Lee Chong Meng & Anor* [1996] 3 CLJ 508; [1996] 3 MLJ 41 Siti Norma Yaakob JCA (as Her Ladyship then was) held as follows:

> We will first consider the effect of s. 84 of the CJA under which the application to refer was made. It relates to the situation where in any proceedings before the High Court the judge may, in his discretion refer a question relating to the effect of any provision of the Constitution to the Federal Court by way of a special case. Before deciding so, the judge must be satisfied that the constitutional question sought to be referred must have a direct bearing to the matter in dispute before him and that the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end. In the same way, the dispute must be related to the constitutional question sought to be referred and that there must be a difficult issue or issues posed by the dispute that are irreconcilable with a constitutional provision and it is only in this situation that reference of a constitutional question becomes necessary.

[33] In a nutshell, the passage in *Wee Choo Keong (supra)* can be summarised as follows:

(a) It must relate to the constitutional question;

(b) It must have a direct bearing to the matter of dispute before him;

(c) There must be difficult issues posed by the dispute that are irreconcilable with a constitutional provision;

(d) That the decision of the Federal Court must have the effect of bringing the determination of the dispute before him to a speedy and economical end.

The learned deputy submitted that the constitutional question posed in the motion in encl. 2 is whether the provision in s. 9, in particular sub-s. 9(5) of PAA is consistent and not '*ultra vires*' art. 10(2)(b) read together with art. 4(2)of the Constitution. The learned deputy further submitted that the constitutional question posed has a direct bearing in the appeal before this court as the issue raised relates to the constitutionality of s. 9(5) of PAA. The decision of the Court of Appeal in *Nik Nazmi Nik Ahmad v. PP* [2014] 4 CLJ 944; [2014] 4 MLJ 157

ruled that ss. 9(1) and 9(5) of PAA contravenes the Federal Constitution and therefore *ultra vires.* This court is bound by the decision of the Court of Appeal according to the principle of '*stare decisis*'.

The Respondent's Submission On Encl. 2

[34] The learned counsel submitted that the court has the discretion and power not to refer the constitutional question posed to the Federal Court if it was of the view that the question posed does not bring a speedy and economical end to the dispute. It is to be noted that the prosecution in *Nik Nazmi Nik Ahmad (supra)* has already filed an appeal to the Federal Court against the decision made by the Court of Appeal and the matter is pending. No doubt the issue raise in the appeal in the instant case relates to the same issue as in *Nik Nazmi Nik Ahmad (supra)* it would be prudent if the court disposes the appeal by the considering the issue of constitutionality of ss. 9(1) and 9(5) as inconsistent and *ultra vires* with art. 10 of the Constitution. Any aggrieved parties can appeal to the Court of Appeal against the said decision. The Court of Appeal is equally competent to determine the issue of constitutionality.

The Finding Of The Court

[35] The court in its wisdom decided to dismiss the motion as the question on constitutionality of s. 9(1) and 9(5) contravenes art. 10(2)(b) of the Constitution and therefore *ultra vires* has been argued and canvassed by both parties at the hearing of the appeal and pending decision by the court. The court is of the view that it is competent to hear the appeal even if the issue involved relates to the question on constitutionality. Any aggrieved party may appeal to the Court of Appeal against the said decision and likewise the Court of Appeal is equally competent to hear the appeal from the High Court even if it involves question on constitutionality as it has decided in *Nik Nazmi Nik Ahmad (supra).* It is pertinent to note that when a criminal matter originated from the Sessions Court, as in the instant case, the Court of Appeal stands as the final court or the apex court. No further appeal shall lie to the Federal Court and the appeal should stop at the Court of Appeal (see *Munawar Ahmad Anees v. PP* [2010] 1 CLJ 802; *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565; [2007] 2 MLJ 101.)

[36] It is pertinent to note whether this court in hearing the motion was exercising its original jurisdiction or whether it was exercising its appellate jurisdiction. If this court is exercising its original jurisdiction then this court has the right to hear the appeal but if this court is of the view that it was hearing the motion in its appellate jurisdiction then the case should end at the Court of Appeal.

[37] It is useful at this juncture to pause and see what are the powers conferred by s. 22 of CJA in respect of its criminal jurisdiction: A

22. Criminal Jurisdiction

(1) The High Court shall have jurisdiction to try:

(a) all offences committed: B

(i) within its local jurisdiction;

(ii) on the high seas on board any ship or on any aircraft Registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; C

(iv) by any person on the high seas where the offence is piracy by the law of nation; and

(b) offence under Chapter VI of the Penal Code, and under any of the written laws specified in the Schedule to the Extra-territorial Offences Act, 1976, or offence under any written law the commission of which is certified by the Attorney-General to effect the security of Malaysia committed, as the case may be: D

(i) on the high seas on board any ship or on any aircraft registered in Malaysia; E

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia; ...

(2) The High court may pass any sentence allowed by law. F

[38] On the question posed earlier, whether the court in hearing the motion was in fact exercising its original jurisdiction or its appellate jurisdiction? The court is of the view that in hearing the motion, that it was exercising its appellate jurisdiction and not exercising its original jurisdiction. This issue was extensively discussed by the Federal Court in *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289 (Criminal Appeal No: 05-241-10-2013) the brief facts are the appellant appealed to the Federal Court against the decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court. The High Court had earlier dismissed the appellant's motion to set aside or strike out the charges against him and for the appellant to be acquitted and discharged. The issue before the Federal Court was whether the High Court in hearing the motion was in fact exercising its original jurisdiction and thus the decision of the Court of Appeal on the matter was appealable to the Federal Court. The Federal Court was of the view that the High Court in hearing the motion cannot be said to be exercising its original jurisdiction. The Federal Court held that the subject matter of the motion was G H I

in relation to the charge that were preferred against the appellant in the Sessions Court. Without the charge in the Sessions Court the appellant has no basis to file the motion before the High Court and the motion cannot stand on its own.

[39] In the instant case, the High Court is not the trial court. The trial court has to be the Sessions Court and no doubt the hearing of the motion was first exercised by the High Court it cannot be said that the High Court is the court of first instance. The High Court in hearing the motion was not exercising its original jurisdiction but exercising its appellate jurisdiction. The court is of the view that if the applicant (respondent in this appeal) is aggrieved by the decision of this court on the basis that the court is not with the applicant in this appeal and the motion, the applicant can appeal against the said decision to the Court of Appeal but not to the Federal Court.

[40] Reverting to the substantive appeal before the court, it is also pertinent to note that in *Nik Nazmi Nik Ahmad (supra)* the Sessions Court did not hear the oral testimony of witnesses on whether Nik Nazmi was an organiser of the assembly at the indoor stadium unlike in the instant case. That issue was never canvassed. In *Nik Nazmi*'s case the appellant applied by way of notice of application to the High Court for an order that s. 9(1) and s. 9(5) of the PAA are null and void. Further the appellant prayed for an order that the charge and prosecution against him under s. 9(1) and s. 9(5) of the Act, punishable under s. 9(5), in the Sessions Court, Petaling Jaya be suspended and set aside and further to that the High Court order that he be acquitted and released.

[41] In the instant case, one of the grounds of appeal in the petition of appeal is whether the learned SCJ had erred in fact and in law in finding that the appellant was an organiser within the meaning prescribed in s. 3 of PAA. The court has read the grounds of judgment of the learned SCJ and agreed with his finding of fact that the appellant was an organiser of the assembly held on 15 May 2013 at the date, time and place as stipulated in the charge. The court agrees with the said finding that the appellant had submitted the notification notice on the OCPD Johor Bahru Selatan at about 2.30pm on 15 May 2013 for an assembly to be held between 8.30pm to 12 midnight. It was also the finding of the court that not only did the appellant submit the notification notice on the OCPD Johor Bahru Selatan, he was also periodically informing members about the progress of the assembly through his Facebook and Twitter. This tantamount to the appellant informing, arranging and being responsible for the conduct of the assembly which is consistent with his position as an executive secretary of PKR Johor as prescribed in the definition of an organiser in s. 3 of PAA. The court also agrees that Dato' Chua Jui Meng could not be considered as an organiser as he had done nothing which could bring him within any of those prescribed act in s. 3 thereof except for the fact that in the column under particulars of

organiser his name and NRIC is stated. He was only present on the night of the assembly to speak. He did come forward to the police to state that he was the organiser when the appellant was arrested by the police for breach of s. 9(1) of PAA after all he was at the material time the Chairman for PKR Johor. The court is also of the view that no adverse inference should be cast on the prosecution for failing to call Dato' Chua Jui Meng as a prosecution witness as no statement was recorded from him.

[42] As to the sentence meted against the appellant of a fine in the sum of RM6,000 and in default three months imprisonment, the court is of the view that the fine imposed is fair and just in the circumstances as the case has proceeded for trial. Valuable court's time have been utilised with witnesses having to come and expended expenses for attending the trial. The court will not disturb the said order on sentence.

[43] On the other issue of whether this court could depart from the decision in *Nik Nazmi Nik Ahmad (supra)* by the Court of Appeal on the issue pertaining to whether s. 9(1) and 9(5) of PAA is *ultra vires* art. 10 of the Constitution, on the doctrine *stare decisis*, the court is bound to follow the decision of the Court of Appeal and shall not venture into analysing the same issue raised in this appeal.

[44] In conclusion, the court allowed the appeal by the appellant and set aside the decision of the learned SCJ on the basis of the decision by the Court of Appeal in *Nik Nazmi Nik Ahmad (supra)* and order that the fine of RM6,000 paid by the appellant be refunded forthwith.